

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Meretricious)	
Relationship of)	No. 64903-5-I
DAVID A. BLACK,)	
)	DIVISION ONE
Appellant,)	
)	UNPUBLISHED OPINION
and)	
)	
PAULA L. EINSTEIN,)	
)	
Respondent.)	FILED: August 2, 2010
)	

Appelwick, J. — Black appeals the decree and judgment that divided personal and real property acquired by him and Einstein during the course of their meretricious relationship. Black argues that the division of property was not just and equitable, that the trial court erred in evidentiary decisions, and that it erred in awarding attorney fees to Einstein. He also contends the proceeding was fundamentally unfair. We affirm.

FACTS

David Black brought suit to have the court recognize his interests in real estate and personal property he acquired with Paula Einstein over a 13 year relationship that ended in 2003.

The parties started dating when they were both living in California. They did not combine resources and maintained separate residences while in California. In December 1993, the two visited Washington. In March 1994, Einstein purchased a farm located at 1863 Wynooche Valley Road, in Montesano, Washington. Black did not contribute anything to the purchase price and did not obligate himself on the loan. Shortly thereafter, the couple began a business known as Onestone Farms on the property. The purpose of the business was horse breeding and horse sales. The business was operated and maintained by funds and efforts of both parties. In 2004, Einstein purchased an 80 acre parcel that adjoined the first parcel she had purchased on Wynooche Valley Road. Einstein also bought and sold other properties nearby.

After trial, the court found that a meretricious relationship existed from 1994, when Black and Einstein moved to Washington and began to run Onestone Farms in Montesano, until 2003, when Einstein learned of an affair Black was having. Although titles to the real property were in Einstein's name, they had been paid for and maintained, in part, by commingled funds. The trial court provided the meretricious community with a 20 percent lien for its equitable interest in the farm real estate acquired by Einstein. The court allowed the parties to divide community personal property equally, retaining jurisdiction over disputed items. Finally, the court divided equally the debts relating to the horse business and retained jurisdiction to assign other liabilities to either party and to offset debts against other amounts awarded in the judgment. Black appeals the trial court's judgment on numerous grounds.

DISCUSSION

When a meretricious relationship terminates, the trial court disposes of property acquired during the relationship by (1) determining the existence of a meretricious relationship; (2) evaluating the interest each party has in the property acquired during the relationship; and (3) making a just and equitable distribution of the property. In re Pennington, 142 Wn.2d 592, 602, 14 P.3d 752 (2000).

The trial court's findings of fact are entitled to deference and are reviewed to determine if they are supported by substantial evidence. Pennington, 142 Wn.2d at 602–03; Gormley v. Robertson, 120 Wn. App. 31, 38, 83 P.3d 1042 (2004). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Abuse of discretion occurs where the trial court's action is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. Olver v. Fowler, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

I. Length of the Meretricious Relationship

Black contends the trial court erred in conclusion of law 3.2, which determined the length of the meretricious relationship as running from the middle of 1994 to the end of 2003. Black contends the meretricious relationship began in 1990 and lasted until January 2005, when Einstein moved off of the farm.

A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not

exist. Connell v. Francisco, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). Relevant factors in establishing a meretricious relationship include, but are not limited to, continuous cohabitation, duration of the relationship, pooling of resources, purpose of the relationship, services for joint projects, and the intent of the parties. Id. A meretricious relationship is a “committed intimate relationship,” See Olver, 161 Wn.2d at 657 n.1.

The trial court did not err in concluding that the meretricious relationship did not begin until the parties moved to Washington and began cohabitating. Substantial evidence supports the court’s finding that, before they moved to Washington, they did not cohabit. While the two spent much time together while in California, they maintained separate apartments and did not commingle funds. The court had a reasonable basis on which it determined the beginning point of the meretricious relationship.

Substantial evidence also supported the trial court’s finding that the relationship ended in late 2003. Black alleged in the complaint that they lived together until 2003. Einstein testified that she discovered in the fall of 2003 that Black had an affair with another woman, who became pregnant as a result. It is reasonable for the court to have concluded that the affair had terminated the “committed intimate relationship.”

The trial court did not err in determining either the beginning or the end dates of the meretricious relationship.

II. Division of Property

Black also argues the court made numerous errors in dividing the

property, resulting in a division that was not just and equitable. A trial court's characterization of property in a meretricious relationship as community-like or separate is a question of law, and is reviewed de novo. In re Marriage of Chumbley, 150 Wn.2d 1, 5, 74 P.3d 129 (2003); In re Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). While the trial court's characterization is reviewed de novo, the actual distribution of property at the end of a meretricious relationship is reviewed for abuse of discretion. In re Meretricious Relationship of Sutton & Widner, 85 Wn. App. 487, 491, 933 P.2d 1069 (1997).

A. Real Property

Black contends the court erred in granting to Einstein ownership of the farm and other parcels of real property. He argues specifically that Einstein did not overcome the presumption of community ownership.

Income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Connell, 127 Wn.2d at 351. All property acquired during a meretricious relationship is presumed to be owned by both parties. Id. However, courts employ the definitions of separate and community property. Id. Property purchased by one of the parties prior to the meretricious relationship is not before the court for division. Id. An asset acquired by gift or inheritance or an asset acquired with the traceable proceeds of separate property will likewise not be before the court for division. In re Marriage of White, 105 Wn. App. 545, 550, 20 P.3d 481 (2001); Connell, 127 Wn.2d at 351. Where funds or services of the would-be community are used to increase the equity or maintain or

increase the value of the separate property, a right of reimbursement to the community might arise. Connell, 127 Wn.2d at 351. A court may offset the “community’s” right of reimbursement against any reciprocal benefit received by the “community” for its use and enjoyment of the individually owned property. Id. However, the community property contributions to the payment of obligations, improvements upon the property, or any subsequent mortgage of the separate property, do not result in a transmutation of the property from separate to community property. In re Estate of Borghi, 167 Wn.2d 480, 491 n.7, 219 P.3d 932 (2009).

Black contends that title to all property acquired during their relationship should be in both parties’ names. The findings of fact, which are effectively uncontested,¹ reveal that all the real property was Einstein’s separate property.²

The court found that Einstein bought the farm with \$45,000 of her separate funds from a California account and borrowed the balance from Northwest Mortgage. Black did not obligate himself on the loan. She then

¹ Although Black has assigned error to virtually all of the findings of fact and conclusions of law, he has provided argument on very few of them. He attempts to incorporate a document he filed with the trial court objecting to the findings of fact and conclusions of law. However, mere incorporation of argument by reference is not sufficient to support assignments of error. U.S. W. Comm’n, Inc. v. Util. & Transp. Comm’n, 134 Wn.2d 74, 111–12, 949 P.2d 1337 (1997); see Kwiatkowski v. Drews, 142 Wn. App. 463, 499–500, 176 P.3d 510 (2008). Even if it were, his objection to the findings of fact and conclusions of law filed with the trial court does not provide citations to the record sufficient for us to review. Black’s statement of the case contains many citations to the record, but most of them are citations only to his own direct testimony, and ignore all other testimony.

² The record demonstrates that Einstein alone signed all the purchase and sale documents on the farm property and the house on River Street.

purchased an 80 acre parcel adjoining the farm, which she did by borrowing the purchase price from a bank. Her father was a cosigner. Again, Black contributed no portion of the purchase price nor did he obligate himself on the loan.

While it is true that payments on the mortgage on the farm property came from two bank accounts, into which they both deposited their earnings, the court specifically found that “[t]he contributions by Mr. Black to the real property were offset considerably by the value he received from living on the premises and being able to use the premises for business operations.” The court also found the contribution by the community to the farm “did not amount to a significant portion of the real property equity.” And, as we discuss later, the court appropriately determined the community had a 20 percent lien on the farm property to recognize this contribution. The trial court did not err in determining that the farm property was Einstein’s separate property.

Einstein bought two more parcels of real property. She purchased a house on River Street in Montesano by borrowing against her separate property, and Black contributed no portion of the purchase price nor did he obligate himself on the loan. As to the house on River Street, the court found Einstein “did not intend for David Black to have any interest in the . . . property.” She also purchased a house and real property at 829 Wynooche Valley Road. Black contributed no portion of the purchase price nor did he obligate himself on the loan. In January 2005, Einstein sold the property at 829 Wynooche Valley Road and used the proceeds to reduce the loan on the 80 acre parcel. Neither party

has any remaining interest in the property at 829 Wynooche Valley Road, nor is the property subject to the court's decree and judgment.

The court did not err in determining these parcels were Einstein's separate property.

B. Personal Property

Black assigns error to the court's award of separate personal property. At the time of entry of the judgment, the parties had already substantially divided the personal property. The judgment awarded to each the property in their possession. As to the remaining personal property, including equipment, hay, tractors, rakes, balers, and other farm tools, it was to be divided by agreement of the parties or sold. The court provided in its conclusions of law, which were incorporated into the judgment, that if there were disputes about how to divide the remaining personal property, the court would retain jurisdiction over the disputed items. Black does not argue that the trial court mischaracterized any of the personal property or explain how the court inappropriately awarded the separate property. Black fails to show how this division constituted an abuse of discretion.

C. Debts

Black contends, without colorable argument, that the court erred in dividing the debts between the parties. The court concluded that "[t]he farm and horse raising business, as opposed to the real property, was operated and maintained by funds and efforts put in by each of the parties." Based on this finding, the court concluded, "Debts that relate to the horse business shall be

divided equally and the court will retain jurisdiction to assign liabilities to either party for payment or to offset debts against any entitlement under this judgment.” Considering the poor financial records before the court, and considering its finding that the business was a joint effort, the equal division of debt is reasonable.

Black also argues the court erred by imposing upon Black debt obligations incurred by Einstein after the date of separation. On August 7, 2006, the court entered a temporary order preventing the parties from, *inter alia*, “incurring any debt or liability in the other party’s name or for which the other party might be charged.” Black appears to contend the trial court’s conclusion of law that all debts be divided equally cannot apply to the \$80,000 debt Einstein incurred after the court order. The court heard testimony from Einstein that she had to incur more debt to pay down the purchase price of the additional 80 acres. She explained that, even after their relationship ended, she continued to pay the debt on the 80 acres and Black did not. To do so, she used a line of credit, totaling approximately \$80,000. While the debt was certainly incurred after the separation, it was in her name only, so it did not violate the court’s August 2006 order.

The trial court had a sound basis for imposing half of this debt on Black. Black had continued to live on the farm property after the end of the meretricious relationship in late 2003, through November 30, 2006. During that period, Einstein was primarily paying the taxes and mortgage. Because Black benefitted from the use of the property for which the debt was necessarily incurred, the

division of debt was just and equitable. The court did not abuse its discretion.

D. Loan

Black next argues the court erred by including in the decree and judgment the \$9,500 loan Einstein made to Black, claiming it was taken care of by the accounting of his expert. The court's finding states: "Mr. Black acknowledged that he owed this amount to her." Further, Black's argument that his accountant had "accounted for" the loan is without merit, as the court determined that Black's accountant was not credible.

E. Adjustments for Other Property Losses

Black argues the court erred in granting a \$5,000 judgment against him for the loss of Serengetti, a horse that died while in Black's care. Black argues that he was acting as bailee of Serengetti and, therefore, can only be liable for the horse's death if he acted with negligence. This argument is without merit, as Black took the horse from the farm in violation of the court's order that he not remove anything from the property. This constituted conversion. The measure of damages for conversion is the value of the converted item at the time of the taking. In re Marriage of Langham & Kolde, 153 Wn.2d 553, 564, 567, 106 P.3d 212 (2005). The court heard evidence that Serengetti might have been sold for up to \$15,000. The court did not abuse its discretion by awarding \$5,000 to Einstein for her share of the loss of Serengetti.

Finally, Black argues the court erred in granting judgment against him for \$7,240 for personal property he took from the farm after the court entered the restraining order. He claims that issues of personal property were settled on

May 16, 2008. The May 16 hearing had to do with whether the 31 items Black claimed as his separate property could be held out of the auction. The judgment for \$7,240 covered only Einstein's share of the personal property³ Black took from the farm in violation of the restraining order. Einstein provided the court with an extensive list of property Black had taken, including expensive farm equipment, horses, and a substantial amount of horse-related items (saddles, medicine, harnesses, bridles, halters, etc.). Black has not provided any evidence that the award was overvalued. The court did not abuse its discretion by awarding Einstein \$7,240 for the loss of personal property.

III. 20 Percent Community Lien

Black next claims that the trial court erred in awarding to the community a lien against Einstein's separate real property in the amount of 20 percent of the value of the net proceeds of the sale of her real property.⁴ Because the court found that the community's services increased the equity of the farm property (Einstein's separate property), a right of reimbursement to the community arose. Connell, 127 Wn.2d at 351. The 20 percent lien was to be divided equally between the parties. Black claims it is "contrary to the record and the law."

Black does not provide sufficient argument on this issue. Importantly, the trial court made a factual finding that "[t]he failure of the parties to keep accurate and proper records of the farming business and Mr. Black's combining of his

³ The order does not specify whether this amount covers Einstein's separate personal property or community property Black had taken without permission.

⁴ The court ordered that the 20 percent proceeds from the sale would be deposited with the clerk of the court.

income into one tax return prevents an accurate determination of the contributions of the 'community.'” The court also found that the testimony of Mr. Rich, Black’s accountant, about Black’s contribution was not persuasive, “because it merely accepts the claims of . . . Mr. Black regarding his contributions of money and labor without independent verification.” This court may not disturb the credibility determinations of the trial court. In re Marriage of Meredith, 148 Wn. App. 887, 891 n.1, 201 P.3d 1056 (2009), review denied, 167 Wn.2d 1002, 220 P.3d 207 (2009). The trial court did not have accurate financial data on which to base its calculation of the community’s right of reimbursement. It was impossible for the court to determine a precise percentage, as the financial records were imprecise. Black failed to present the trial court with credible evidence that might have demonstrated he deserved a larger lien against the sale of the farm property. Einstein has not cross-appealed the award of the 20 percent lien as too high, despite the absence of accurate business records.

The court ordered that the proceeds of the sale of the real property be deposited with the court and held until the IRS (Internal Revenue Service) had an opportunity to review the parties’ tax returns and determine whether they owed back taxes. Black contends the court was without power to allow the IRS to lay claim to his portion of the proceeds from the sale of the real property, but he does not provide any authority to support his contention.

The trial court did not abuse its discretion in awarding a 20 percent lien to the meretricious community, and it was not error for the court to allow the IRS to

lay claim to Black's 10 percent of the lien.

IV. Evidence from the Preliminary Hearings

Black appeals the admission of testimony from the hearing in early November 2006 on motions for restraining orders and temporary possession of the farm. Black argues this testimony was not part of the trial.

CR 65(a)(2) provides, "[A]ny evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." When Black objected to Einstein's introduction of this testimony, the court, on hearing Black's objection, gave Black the opportunity to object to anything from the November hearing. Black did not object. We find no merit in Black's argument.⁵

V. Contempt

Black next contends the trial court delegated its contempt power to Einstein. Punishment for contempt of court is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

On May 14, 2007, a hearing occurred concerning whether Black was in contempt of court for violating the restraining order against removal of personal property entered in November 2006. Einstein told the court that Black had not

⁵ Black also argues that other dates being considered were "not trial days" and therefore not part of the record. First, on June 7, 2007, a hearing took place on a motion to continue the trial. We see no reason that this hearing should not be part of the record. Next, the hearing on October 18, 2007, involved a post trial motion to deal with personal property issues, and is properly part of the record.

yet returned personal property that was to remain on the farm until the court had a chance to decide on an equitable distribution. The court responded by admonishing Black for being in contempt, and explaining that Black had to “make a[n] inventory of everything you have taken and take it back, unless Mr. Parker’s client [Einstein] says I don’t want that or you can keep [it]. That’s what I meant it was totally in her control.” The trial court did not delegate contempt power to Einstein; it found Black in contempt. The court merely recognized Einstein had the right to allow Black to keep some of the property, and if she did, it relieved Black of contempt for retaining those items. We see no abuse of discretion.

Black also argues the court should have imposed sanctions on Einstein for the sale of hay and some horses, in violation of the same restraining order that Black had violated. The court declined to impose sanctions for a few reasons: first, it would not be productive to have a contempt hearing in the middle of trial; second, her violations were far less egregious than Black’s; third, the court had heard and accepted Einstein’s testimony about why she had sold the hay and horses; and finally, it gave both parties an opportunity to present further evidence about the alleged violations that very day.⁶ And, the court retained full authority to divide the value of the disposed property. There was no abuse of discretion.

⁶ The record demonstrates the court heard testimony about the value of the horses, and Black does not provide a citation to the record indicating he contested the value, nor that the horses were irreplaceable. While Einstein did violate the order, the value of property sold was known, so her violation did not impede the division of property.

VI. Discovery Sanctions

Black argues the court erred by refusing to compel discovery from Einstein. Discovery rulings and discovery sanctions are reviewed for an abuse of discretion. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). The case was to go to trial on June 12, 2007. On June 15, Black served a set of interrogatories and requests for production on Einstein. Black moved to compel responses and argued the motion on July 19. The court appropriately ruled it would not compel responses, as discovery should have been completed long before trial started, and the interrogatories were burdensome and overly broad.

Black next argues Einstein's counsel had improper ex parte contact with Black's expert accountant, in violation of In re Firestorm 1991, 129 Wn.2d 130, 137, 916 P.2d 411 (1996) (holding that "as a general principle ex parte contact with an opposing party's expert witness is prohibited by CR 26"). The court, recognizing that Einstein's attorney should not have contacted Black's expert, admonished Einstein's attorney not to call the expert. Further, the court took into consideration the attorney's explanation of his contacts with the expert, which was to ask the expert about the nature of his task and whether he needed information from Einstein, and to confirm the date on which the attorney would take the adverse expert's deposition. The court determined the attorney had acted in good faith and refused to impose sanctions, as it would have not been a proportionate response to the alleged violation. The court did not abuse its discretion. Fisons Corp., 122 Wn.2d at 338.

VII. Evidentiary Decisions

Black assigns error to many of the court's evidentiary decisions. We review evidentiary decisions for an abuse of discretion. Hume v. Am. Disposal Co., 124 Wn.2d 656, 666, 880 P.2d 988 (1994).

A. Use of Prepared Notes During Testimony

Black argues the court abused its discretion in allowing Einstein to read from prepared notes in two separate instances.

ER 612 allows a witness to use a writing to refresh his or her memory for the purpose of testifying, provided that (1) the witness's memory needs refreshing, (2) opposing counsel have the right to examine the writing, and (3) the trial court be satisfied that the witness is not being coached—that the witness is using the notes to aid, and not to supplant, his own memory. State v. Williams, 137 Wn. App. 736, 750, 154 P.3d 322 (2007).

When Einstein testified about the dates of purchase and mortgages for the various real property she owned, the court allowed her to use a list she had prepared. Black does not contend that he was deprived of an opportunity to examine the writing or that Einstein did not need to refresh her memory. Instead, he argues it supplanted her testimony. Given that the nature of the testimony was detailed financial information, we hold the court did not abuse its discretion in allowing Einstein to use a writing to refresh her recollection. Rather, the court instructed Einstein to answer without using the writing, and only if she could not answer should she consult the writing. Further, the court did not admit the writing into evidence.

Black also argues the same error occurred with regard to Exhibits 108–10. These exhibits concerned Einstein’s financial activities conducted from her California bank account. Black’s counsel cross-examined Einstein on when and how she prepared the writing. The exhibits were not allowed into evidence. Again, given the detailed financial information about which Einstein had to testify, it was reasonable to allow Einstein to refer to these writings. Further, Black’s counsel had the opportunity to conduct voir dire to establish when Einstein created the proposed exhibits and what their purpose was. There was no abuse of discretion.

B. Tax Returns and Business Records

Black argues the trial court erred in admitting Einstein’s tax returns, contending they were hearsay. The tax returns were admitted to prove that Einstein had filed her tax returns, not for the truth of the matters asserted within the returns themselves. ER 801(c).

Black also argues the court erred in admitting some of Einstein’s business records. The contested records were checks from Einstein’s checking accounts in California and Washington, offered to show her farm expenses, as well as “tapes” (from an adding machine). The court admitted them as evidence of her expenditures for the farm as business records, but did not admit the envelope with her notations or the summaries she prepared. Black contends the trial court admitted them as substantive exhibits when they were meant to be illustrative exhibits. It appears from the court’s ruling that it admitted the checks as substantive evidence and the tapes as illustrative for calculation.

Neither of these decisions constitutes an abuse of discretion.

C. Duplicate Evidence

Black also contends the trial court imposed a “double standard” in its evidentiary rulings. The first instance involves admission of duplicate documents, where the court knew Black was going to duplicate an exhibit and did not allow it, versus the court’s decision to allow Einstein to admit an exhibit that may have been a duplicate.

The next alleged instance of a double standard is the court’s refusing to permit Black’s expert accountant testify as to a legal conclusion about the relationship between Black and Einstein. When the same question was asked of Einstein’s expert, the court directed the questioning away from that topic and acknowledged Black’s objection.

Neither of these instances demonstrates that the trial court employed a double standard on evidentiary decisions, so no abuse of discretion occurred.⁷

VIII. Entry of Findings of Fact and Conclusions of Law

Black assigns error to the court’s conclusion of law 3.1, which explained that the court was retaining jurisdiction on matters that it could not resolve at the

⁷ Finally, Black makes two arguments that we find entirely unpersuasive. First, he argues the court treated the parties’ accounting experts differently. He argues the court’s decision that his expert accountant could not listen by cell phone to Einstein’s expert’s testimony was in error. Courtroom management decisions are within the sound discretion of the trial court. In re Marriage of Zigler & Sidwell, 154 Wn. App 803, 815, 226 P.3d 202 (2010).

Black also argues the court erred in how it used the illustrative exhibits, treating them as substantive evidence. This argument is without merit. The trial court, a year after the main phase of the trial had ended, stated it would refer to some illustrative exhibits in making his ruling, and that it would refer to its notes on which exhibits were admitted and which were illustrative.

time of entry of judgment until it had more information from the parties. He also claims the court erred in delaying the entry of findings of fact and conclusions of law.

The chronology of the case demonstrates that the court waited to enter findings and conclusions until after the parties had a chance to settle disputes over the handling of personal property. At the conclusion of trial, the court explained it would wait to deal with personal property until it saw the lists. The “list” approach did not work, and the court approved the parties’ proposal for an auction. Both parties submitted findings and conclusions. Because there were so many discrepancies, the court heard argument on May 20, 2008, about how to resolve the conflicts. The court decided it would work from Einstein’s draft findings and conclusions and set a follow-up hearing for June 5, hoping to allow time to resolve the remaining personal property disputes.

On June 13, instead of entering findings and conclusions, the court stated it wanted to give the parties one last chance to present evidence on personal property issues. It also prepared a judgment with blanks to be filled in depending on the final resolution of personal property disputes. The final hearing occurred on July 17, 2008, the day on which the court entered the findings and conclusion. The court never closed the record. To the contrary, the court generously gave each party several opportunities to present evidence to reach an accurate and just result.⁸ The court did not err in its procedure for

⁸ Black’s contention that the court allowed Einstein to control the judgment is meritless. Black quotes out of context the court’s statement that Einstein could apply funds to pay off quasi-community debt, “However she wants to do it.”

entering findings and conclusions.

IX. Recusal

Finally, Black contends he was deprived of a fair trial, because the judge had decided before trial began that Black was not credible. The court entered a specific finding about Black's credibility, stating "Mr. Black's credibility is not good in this Court. Examples of his dishonesty are detailed in the attached oral decision." As a threshold matter, this court may not disturb the credibility determinations of the trial court. Meredith, 148 Wn. App. at 891 n.1.

Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) require that a judge disqualify himself from hearing a case if that judge is biased against a party or if his impartiality may be reasonably questioned. Id. at 903. A trial court is presumed to perform its functions regularly and properly without bias or prejudice. Id. Evidence of a judge's actual or potential bias is required. Id. Black has not provided specific instances of the judge's actual or potential bias. Rather he argues that the judge was influenced by presiding over the temporary restraining order hearings. This cannot be the basis for a bias claim. It is entirely permissible for a judge to preside over a trial where that judge has also presided in an earlier phase in the case. Withrow v. Larkin, 421 U.S. 35, 56, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Further, without pointing to specific instances that may have required recusal during the trial, the entry of a credibility finding as part of the findings of fact cannot serve to show bias.

X. Fees

Black challenges the award of fees to Einstein's counsel under Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 598–99, 675 P.2d 193 (1983), arguing there are not findings or conclusions to substantiate the amount of fees, and more generally, that there is no basis for the award. Under the contempt statute, the court may require, as a remedial sanction, the payment of the other party's attorney fees. RCW 7.21.030(3). The fee award is specifically for "establishing the contempt of David Black." The court awarded \$4,862.50 in fees to Einstein's counsel.

Under the lodestar formula, adopted in Bowers, the attorney requesting the fees submits documentation of the work performed and of a reasonable rate. 100 Wn.2d at 597. The court grants fees by multiplying the number of hours reasonably expended by the reasonable hourly rate of compensation. Id. The court also has discretion to adjust the fees based on the contingent nature of success and the quality of work performed. Id. at 598.

Black does not provide any specific argument as to why the fee award was unreasonable. The record reflects that Einstein's attorney submitted the required documentation, including detailed billing records with hours and rates, and the trial court ruled the fees were "more than reasonable. You never should have had to put up with the intentional contempt of Mr. Black." The court did not abuse its discretion in awarding fees.

We affirm.

Appelwick, J.

WE CONCUR:

Jan, J.

Cox, J.